IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PROGRESSIVE CLASSIC INSURANCE COMPANY,

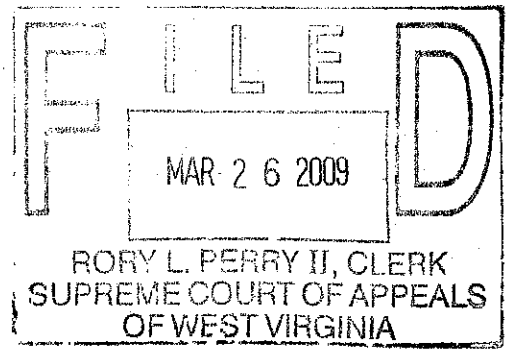
Petitioner,

v.

No.: _____
(Civil Action No.: 08-C-330-2
in the Circuit Court of Harrison County)

HONORABLE THOMAS A. BEDELL, JUDGE, Circuit Court of Harrison County,

Respondent.



PETITION FOR WRIT OF PROHIBITION ON BEHALF OF PROGRESSIVE CLASSIC INSURANCE COMPANY

R. Carter Elkins
W. Va. State Bar I.D. 1116
Laura L. Gray
W. Va. State Bar I.D. 5240

Campbell Woods, PLLC
517 Ninth Street, Suite 1000
Post Office Box 1835
Huntington, West Virginia 25719-1835
(304) 529-2391
Counsel for Petitioner Progressive Classic Insurance Company

PETITION FOR WRIT OF PROHIBITION

Pursuant to Rule of Appellate Procedure 14, petitioner Progressive Classic Insurance Company ["Progressive Classic"], seeks a writ of prohibition prohibiting the respondent, The Honorable Thomas A. Bedell, from enforcing the Order Denying Progressive's Motion to Set Aside Contempt Orders, entered February 11, 2009. The respondent judge acted without jurisdiction and committed clear legal error when he found Progressive Classic in contempt and issued sanctions against Progressive Classic on the basis of an invalid subpoena *duces tecum*.

As grounds for this Petition, Progressive Classic shows unto the Court:

1. That by Order Denying Progressive's Motion to Set Aside Contempt Orders, respondent concluded Rule of Civil Procedure 45(b)(1) did not govern service of a subpoena *duces tecum* upon Progressive Classic, but that a subpoena *duces tecum* could be served upon Progressive Classic through the Secretary of State. (See Appendix ["App."], Ex. 1). Respondent therefore found that service of the subpoena *duces tecum* upon Progressive Classic through the Secretary of State constituted valid service.

Thus, the respondent refused to set aside the Court's prior Order of October 1, 2008, finding Progressive Classic in contempt for failing to appear and produce documents in response

to the subpoena *duces tecum*; its Order of November 21, 2008, granting sanctions against Progressive Classic; and, its Order of December 8, 2008, awarding attorney's fees against Progressive Classic. (App., Exs. 2, 3 and 4).

2. The Order Denying Progressive's Motion to Set Aside Contempt Orders is clearly erroneous, as service of a subpoena *duces tecum* is governed by Rule 45(b)(1) and Rule 45(b)(1) does not authorize service of a subpoena *duces tecum* through the Secretary of State. The subpoena *duces tecum* was not properly served and, therefore, was unenforceable. Because the subpoena *duces tecum* was unenforceable, the respondent did not have jurisdiction over Progressive Classic.

3. Rule 4.1 provides that Rule 45 governs service of subpoenas. Rule 45(b)(1), in turn, contains mandatory language authorizing service of a subpoena in only one manner:

> Service of a subpoena upon a person named therein **shall** be made in the same manner provided for service of process under Rule 4(d)(1)(A) and by tendering to that person if demanded the fees for one day's and the mileage allowed by law. [Emphasis supplied].

Rule 4(d)(1)(A) sets forth the only method by which a subpoena may be served:

> Personal or substituted service shall be made in the following manner:
> (1) Individuals.--Service upon an individual other than an infant, incompetent person, or convict may be made by:
> (A) Delivering a copy of the summons and complaint to the individual personally; ...

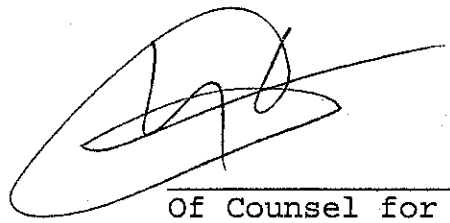
4. Despite the clear mandate of Rule 45(b)(1), the respondent rewrote the Rule so as to permit service of a subpoena *duces tecum* upon a non-party corporation through the Secretary of State. The plain language of Rule 45(b)(1) contains no such provision and, by its use of the word "shall" is mandatory with respect to the sole means by which a subpoena may be served -- only by the method provided in Rule 4(d)(1)(A).

5. A subpoena that is not properly served is unenforceable. *West Virginia Advocates for the Developmentally Disabled v. Casey*, 178 W. Va. 682, 684, 364 S.E.2d 8, 10 (1987). Rule 45(b)(1) does not authorize service of a subpoena *duces tecum* upon Progressive Classic through the Secretary of State. Because service was defective, the lower court acted without jurisdiction when it issued its October 1, 2008 Contempt Order; its November 21, 2008, Sanctions Order; its December 8, 2008, Order awarding fees; and, its February 11, 2009, Order Denying Progressive's Motion to Set Aside Contempt Orders.

WHEREFORE, the petitioner, Progressive Classic Insurance Company, respectfully prays that this Court grant its Petition for Writ of Prohibition, and issue a rule to show cause against respondent, The Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County. Further, your petitioner prays that this Court prohibit respondent from enforcing the Order Denying Progressive's Motion to Set Aside Contempt Orders,

vacate that Order and direct the respondent to enter an Order Granting Progressive Classic Insurance Company's Motion to Set Aside Contempt Orders. Your petitioner also prays for such further relief as this Court may deem just.

Respectfully submitted,



Of Counsel for Petitioner Progressive Classic Insurance Company

R. Carter Elkins
W. Va. State Bar I.D. 1116
Laura L. Gray
W. Va. State Bar I.D. 5240

Campbell Woods, PLLC
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Post Office Box 1835
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MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION ON BEHALF OF PROGRESSIVE CLASSIC INSURANCE COMPANY

R. Carter Elkins
W. Va. State Bar I.D. 1116
Laura L. Gray
W. Va. State Bar I.D. 5240

Campbell Woods, PLLC
517 Ninth Street, Suite 1000
Post Office Box 1835
Huntington, West Virginia 25719-1835
(304) 529-2391
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MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION ON BEHALF OF PROGRESSIVE CLASSIC INSURANCE COMPANY

Comes now the petitioner, Progressive Classic Insurance Company ["Progressive Classic"], pursuant to Rule of Appellate Procedure 14, and submits this memorandum of law in support of its Petition for Writ of Prohibition.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On June 30, 2008, plaintiff Judith Swoger filed suit against Progressive Classic's insured, Dina McKinney, alleging that Ms. McKinney negligently caused an automobile accident on July 16, 2006. (App., Ex. 5). Progressive Classic is not a party to this action, but is simply the liability insurer for the defendant, Dina McKinney. Nonetheless, on August 20, 2008, counsel for plaintiff issued a subpoena *duces tecum*, directed to Progressive Classic, seeking documents from Progressive Classic's claim file. (App., Ex. 6). The subpoena *duces tecum* was returnable on September 4, 2008. (App., Ex. 6).

Plaintiff attempted to serve the subpoena *duces tecum* upon Progressive Classic through the West Virginia Secretary of State. (App., Ex. 6). Because, however, service of a subpoena *duces tecum* through the Secretary of State is not valid service under Rule of Civil Procedure 45, Progressive Classic did not respond to the subpoena *duces tecum*.

Thereafter, plaintiff filed a Motion for Order of Contempt Against Progressive Classic Insurance Company and/or Its President or Other Person Who Disregarded Subpoena Issued from this Court ["Motion for Order of Contempt"]. A hearing was held on September 24, 2008, upon the Motion for Order of Contempt.

On October 1, 2008, the Circuit Court entered an Order Finding Contempt of Court Against Progressive Classic Insurance Company and/or its President or Other Person Who Disregarded Subpoena Duces Tecum Issued from This Court ["Contempt Order"]. (App., Ex. 2). In the Contempt Order, the Circuit Court found, *inter alia*, that:

> 4) Plaintiff then served a Subpoena duces tecum on Progressive through the West Virginia Secretary of State, pursuant to West Virginia Code §33-4-12, and also faxed a courtesy copy of that Subpoena duces tecum to Progressive's claims representative located in Charleston, West Virginia, Michael W. Eaton; the Secretary of State accepted service on behalf of Progressive on August 21, 2008, and forwarded it to Progressive through the C. T. Corporation System, its agent, where it was signed by Sharon R. Barth, all as set forth on the Secretary of State's official website; a return date for the Subpoena duces tecum and deposition was set for September 4, 2008; ...
>
> 9) The Court finds that Progressive was properly served and had notice of the Subpoena duces tecum; ...

(App., Ex. 2, pp. 2, 3).

The Contempt Order ordered Progressive Classic to appear at plaintiff's counsel's office on October 29, 2008, for

a deposition and production of the documents listed in the subpoena *duces tecum*. (App., Ex. 2). The Court held in abeyance plaintiff's request for a civil penalty, but awarded plaintiff $1,062.50 in fees and costs. (App., Ex. 2).

Progressive Classic did not appear on October 29, 2008, and plaintiff filed a Motion for Contempt Sanctions Against Progressive Classic Insurance Company and/or its President or Other Person who has Disregarded this Courts [sic] Orders ["Motion for Sanctions"]. A hearing upon the Motion for Sanctions was held on November 19, 2008.

By Order Granting Contempt Sanctions against Progressive Classic Insurance Company ["Sanction Order"], entered November 21, 2008, the Circuit Court once again erroneously found that Progressive Classic had been properly served with the subpoena *duces tecum*, but failed to appear for the deposition and failed to produce documents. (App., Ex. 3). The Court ordered Progressive Classic to pay plaintiff a civil penalty for contempt in the amount of $5,000, assessed a civil penalty, payable to plaintiff, of $750 per day against Progressive Classic until the deposition took place and documents were produced and ordered plaintiff's counsel to submit an affidavit of costs and fees incurred. (App., Ex. 3). By Order entered December 8, 2008, the Court awarded $562.50 in costs and fees to counsel for plaintiff. (App., Ex. 4).

Given that the Circuit Court's Orders were interlocutory in nature, Progressive Classic gave the lower court an opportunity to correct its erroneous finding that service of a subpoena *duces tecum* through the Secretary of State was proper. Progressive Classic filed a Motion to Set Aside Order Finding Contempt of Court against Progressive Classic Insurance Company and/or its President or Other Person Who Disregarded Subpoena Duces Tecum Issued from this Court; Order Granting Contempt Sanctions Against Progressive Classic Insurance Company; and, Order Awarding Attorney's Fees ["Motion to Set Aside Contempt Orders"]. A hearing on Progressive Classic's Motion to Set Aside Contempt Orders was held on February 4, 2009, but the Circuit Court refused to alter its position that a subpoena *duces tecum* could be served through the Secretary of State, notwithstanding that such service is not authorized by the Rules of Civil Procedure.

On February 11, 2009, the Court entered its Order Denying Progressive's Motion to Set Aside Contempt Orders. (App., Ex. 1). The Circuit Court erroneously rewrote Rule of Civil Procedure 45 and added a provision which is not currently found in Rule 45, permitting service of a subpoena *duces tecum* through the Secretary of State. (App., Ex. 1). It is the Order Denying Progressive's Motion to Set Aside Contempt Orders which gives rise to this Petition for Writ of Prohibition.

II. ASSIGNMENT OF ERROR

The Circuit Court acted without jurisdiction when it relied upon an invalid subpoena *duces tecum* as the basis for issuing contempt sanctions against a non-party, Progressive Classic. The Circuit Court also committed clear legal error when it held that service of a subpoena *duces tecum* could be accomplished through the Secretary of State. Rule of Civil Procedure 45 mandates the method by which proper service of a subpoena *duces tecum* may be achieved and service through the Secretary of State is not authorized by Rule 45. Inasmuch as service of the subpoena *duces tecum* was improper, the Circuit Court's Contempt Order and Sanction Order are invalid and cannot be enforced against Progressive Classic. *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 631, 425 S.E.2d 577, 586 (1992).

III. STANDARD OF REVIEW

A writ of prohibition "shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code §53-1-1. "'When a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right regardless of the existence of other remedies.'" *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 665, 584 S.E.2d 517,

521 (2003), *quoting Jennings v. McDougle*, 83 W. Va. 186, 98 S.E. 162 (1919).[1]

Inasmuch as service of the subpoena *duces tecum* upon Progressive Classic was defective, the Circuit Court lacked jurisdiction to proceed against Progressive Classic and to sanction Progressive Classic for failure to comply with an invalid subpoena *duces tecum*. A writ of prohibition is neces-

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[1]In instances where the lower court has jurisdiction, but exceeds its legitimate powers, the standard for review for a writ of prohibition was articulated in *State ex rel. Hoover v. Berger*, Syl. Pt. 4, 199 W. Va. 12, 483 S.E.2d 12 (1996):

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Even if the lower court had jurisdiction over Progressive Classic, the criteria set forth in *State ex rel. Hoover* are met for the issuance of a writ of prohibition. Progressive Classic is not a party and, therefore, has no means for a direct appeal. The lower court's Order demonstrates clear legal error and the issue presented is an issue of first impression for this Court.

sary to restrain the Circuit Court's attempt to act without jurisdiction.

IV. ANALYSIS

A. Rule 45(b)(1) does not authorize service of a subpoena *duces tecum* through the Secretary of State.

The Circuit Court's improper attempt to exercise jurisdiction over Progressive Classic was based solely upon the erroneous assumption that service of the subpoena *duces tecum* was proper. The Circuit Court found that the subpoena *duces tecum* was served upon Progressive Classic through the Secretary of State, pursuant to W. Va. Code §33-4-12, and that such service was proper. (App., Ex. 2, p. 2). It is, however, Rule of Civil Procedure 45(b) which governs service of a subpoena *duces tecum*, not W. Va Code §33-4-12.

Rule 45(b) sets forth the proper method for service of a subpoena *duces tecum*:

> (1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. **Service of a subpoena upon a person named therein shall be made in the same manner provided for service of process under Rule 4(d)(1)(A)** and by tendering to that person if demanded the fees for one day's and the mileage allowed by law. When the subpoena is issued on behalf of the State or any officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).
> (2) A subpoena may be served at any place within the State.

> (3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service. [Emphasis supplied].

Rule 45(b)(1)'s directive as to method of service is mandatory, for the Rule utilizes the word "shall." It is well-settled that use of the word "shall" has a mandatory, not discretionary, construction. "This rule utilizes the term 'shall,' and thus is mandatory." *Cable v. Hatfield*, 202 W. Va. 638, 646, 505 S.E.2d 701, 709 (1998).

The mandatory method for service of a subpoena *duces tecum* authorized by Rule 45(b)(1) is service in the "same manner provided for service of process under Rule 4(d)(1)(A)." Rule 4(d)(1)(A) does not permit service of a subpoena *duces tecum* upon Progressive Classic through the Secretary of State, but requires personal service:

> (d) *Manner of service.*--Personal or substituted service shall be made in the following manner:
> (1) Individuals.--Service upon an individual other than an infant, incompetent person, or convict may be made by:
> (A) Delivering a copy of the summons and complaint to the individual personally; ...

Personal service of a subpoena *duces tecum* under Rule 4(d)(1)(A), is necessary, not only because it is the only method of service authorized under Rule 45(b), but also because Rule 45(b) requires that the witness fee and mileage be tendered to the witness, upon demand, with service of the subpoena. A

witness cannot make such a demand if service of the subpoena *duces tecum* is attempted through the Secretary of State. A witness can only demand the fee and mileage if personally served.

By approving service through the Secretary of State, the lower court deleted that portion of Rule 45(b)(1) which requires tender of the witness fee and mileage upon request. The lower court's construction of Rule 45(b)(1) renders that portion of the Rule a nullity for a witness served through the Secretary of State is deprived of the opportunity to request the witness fee and mileage.

Similarly, Rule 45(b)(3) provides that proof of service is made by filing with the clerk of the court in which the subpoena was issued "a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service." The Circuit Court failed to recognize that filing proof of service under Rule 45(b)(3) cannot be accomplished if service is attempted through the Secretary of State. Under that scenario, who is "the person who made the service?"

The Circuit Court also ignored Rule 4.1. Rule 4.1(a) unequivocally directs that "Rule 45 governs the service of subpoenas," thereby reinforcing the principle that only the method of service authorized by Rule 45(b) is valid.

Thus, there is an interplay of three rules regulating service of a subpoena *duces tecum*. First, Rule 4.1 directs that service of a subpoena *duces tecum* is accomplished through Rule 45. Second, Rule 45 authorizes service only in the method set forth under Rule 4(d)(1)(A). Third, Rule 4(d)(1)(A) requires personal service.

Neither Rule 4.1 nor Rule 45 nor Rule 4(d)(1)(A) authorize service of a subpoena *duces tecum* through the Secretary of State. The lower court disregarded the mandatory nature of Rule 45(b)(1) and gave no credence to the language providing that a subpoena "shall" be served in the same manner as service of process under Rule 4(d)(1)(A). Rule 4(d)(1)(A) requires personal service.

A subpoena that is not properly served is unenforceable. *West Virginia Advocates for the Developmentally Disabled v. Casey*, 178 W. Va. 682, 684, 364 S.E.2d 8, 10 (1987). In *West Virginia Advocates*, a specific statutory provision under the Administrative Procedures Act authorized service of a subpoena *duces tecum* via certified mail. *Id.* at Syllabus Point 1. The subpoena *duces tecum* at issue, however, was served upon counsel for an applicant for certificate of need. This Court held that a subpoena *duces tecum* not served in accordance with the statute was not valid. *Id.* at 684, 364 S.E.2d at 10. "The statute does not authorize service on attorneys, and the circuit court was

correct in ordering that the subpoena must be quashed for improper service." *Id.*[2]

In this case, Rule 45(b)(1) does not authorize service of a subpoena *duces tecum* upon Progressive Classic through the Secretary of State. Because service was defective, the lower court acted without jurisdiction when it issued its Contempt Order and its Sanctions Order.

B. Federal Rule of Civil Procedure 45(b)(1) is of no guidance as it does not contain the same explicit directive relating to service as does West Virginia Rule of Civil Procedure 45(b)(1).

The Circuit Court relied heavily upon interpretations of Federal Rule of Civil Procedure 45(b)(1) to support its erroneous conclusion that West Virginia Rule of Civil Procedure 45(b)(1) authorizes service of a subpoena *duces tecum* through the Secretary of State. Progressive Classic recognizes that this Court frequently looks to federal interpretation of the Federal Rules of Civil Procedure when analyzing the West Virginia Rules. However, particularly in this case, where the pertinent portions of the Rules differ, "a federal case interpreting a federal counterpart to a West Virginia rule of proce-

[2]The Circuit Court also confused "actual notice" of the subpoena *duces tecum* with proper service of the same. (App., Ex. 1, ¶¶ 1, 2). Actual notice is not, however, synonymous with valid service. In *West Virginia Advocates*, the applicant's attorney had actual notice of the subpoena *duces tecum* but that had no bearing upon whether there had been valid service of the same.

dure may be persuasive, but it is not binding or controlling." *Brooks v. Isinghood*, 213 W. Va. 675, 682, 584 S.E.2d 531, 538 (2003).

Federal Rule 45(b)(1) provides:

> (b) *Service*. (1) *By whom; Tendering Fees; Serving a Copy of Certain Subpoenas*. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

It is readily apparent that Federal Rule 45(b)(1) does not contain the same explicit requirement found in West Virginia Rule 45(b)(1) mandating that service of a subpoena "shall be made in the same manner provided for service of process under Rule 4(d)(1)(A) ..." Federal Rule 45(b)(1) is silent as to the manner for service of a subpoena, other than "delivering a copy to the named person." It is that lack of direction which has caused some federal courts to turn to the general provisions of Rule 4 to assist with service of a subpoena upon a non-party corporation. *See, e.g., In re Motorsports Merchandise Antitrust Litigation*, 186 F.R.D. 344 (W.D. Va. 1999); *In re Pappas*, 214 B.R. 84 (D. Conn. 1997).

These decisions are, however, inapposite when construing West Virginia Rule 45(b)(1), given its explicit direction that a subpoena "shall be" served in the manner "provided for service of process under Rule 4(d)(1)(A) ..." West Virginia Rule 4(d)(1)(A) provides that process is to be served by "[d]elivering a copy of the summons and complaint to the individual personally." Thus, a subpoena may only be served by delivering a copy "to the individual personally." Neither West Virginia Rule 45(b)(1) nor West Virginia Rule 4(d)(1)(A) authorize service of a subpoena *duces tecum* through the Secretary of State.

The lower court refused to acknowledge the vital distinction between Federal Rule 45(b)(1) and West Virginia Rule 45(b)(1). As a result, the lower court adopted the view that service could be accomplished by any means available under Rule 4. In doing so, the Circuit Court rewrote Rule 45(b)(1), by deleting that portion of Rule 45(b)(1) which provides that "service shall be made in the same manner provided for service of process under Rule 4(d)(1)(A).

C. Neither W. Va. Code §33-4-12 nor W. Va. Code §31D-5-504 authorize service of a subpoena *duces tecum* upon a non-party through the Secretary of State.

Although Rule 45(b) alone governs service of a subpoena *duces tecum*, in the Contempt Order of October 1, 2008, the Circuit Court found that W. Va. Code §33-4-12 permitted

service of the subpoena *duces tecum* upon Progressive Classic through the Secretary of State. (App., Ex. 2, p. 2, ¶ 4). Subsequently, in the Order Denying Progressive's Motion to Set Aside Contempt Orders, the Circuit Court shifted its reliance from W. Va. Code §33-4-12 to W. Va. Code §31D-5-504 in ostensible support of its conclusion that service of a subpoena *duces tecum* upon the Secretary of State was proper. (App., Ex. 1, ¶¶ 5, 6). Neither statutory scheme stands for the proposition that a subpoena *duces tecum* properly may be served upon the Secretary of State.

W. Va. Code §33-4-12 authorizes the Secretary of State to accept service of process for licensed insurers, but does not authorize the Secretary of State to accept service of a subpoena *duces tecum* directed to an insurer when Rule 45(b)(1) does not permit service of a subpoena *duces tecum* in that manner. In part, W. Va. Code §33-4-12 provides:

> The Secretary of State shall be, and is hereby constituted, the attorney-in-fact of every licensed insurer, domestic, foreign or alien, transacting insurance in this state, upon whom all legal process in any action, suit or proceeding against it shall be served and he or she may accept service of process. The process shall be served upon the Secretary of State, or accepted by him or her, in the same manner as provided for service of process upon unlicensed insurers under subdivisions (2) and (3), subsection (b), section thirteen [§ 33-4-13] of this article. ...

W. Va. Code §33-4-12 authorizes the Secretary of State to accept legal process for an insurer only "in any action, suit

or proceeding against it." Progressive Classic is not a party to this action, nor is this a suit or proceeding against Progressive Classic. Because a subpoena *duces tecum* does not relate to "any action, suit or proceeding" against Progressive Classic, the Secretary of State is not authorized to accept service of the same on behalf of Progressive Classic.

Furthermore, a subpoena *duces tecum* does not constitute "legal process." In this context, plaintiff apparently is attempting to utilize a subpoena *duces tecum* against a non-party, Progressive Classic, as part of the discovery process. "Rule 45 is found in the section of the West Virginia Rules of Civil Procedure titled 'Trials.' Therefore, it is not technically a discovery rule." *Keplinger v. Virginia Elec. & Power Co.*, 208 W. Va. 11, 20, 537 S.E.2d 632, 641 (2000). When, however, used in conjunction with Rule 30 or Rule 34 to obtain documents or testimony from a non-party, Rule 45 is a discovery mechanism. *Id. See also State ex rel. West Virginia State Police v. Taylor*, 201 W. Va. 554, 499 S.E.2d 283 (1997).

A subpoena *duces tecum*, issued by an attorney in conjunction with discovery, is not "legal process", as contemplated in W. Va. Code §33-4-12. This is clearly demonstrated by the language of Rule 45(b)(1), which provides, in part, "[s]ervice of a subpoena upon a person named therein shall be made in the same manner provided for service of process under

Rule 4(d)(1)(A)..." The explicit reference to service of process under Rule 4(d)(1)(A), reinforces that a subpoena *duces tecum* itself is not "legal process" governed by W. Va. Code §33-4-12. If it was considered to be process, then the reference in Rule 45(b) to "service of process under Rule 4(d)(1)(A)" would be redundant.

Perhaps in belated recognition of the fact that W. Va. Code §33-4-12 did not actually support the proposition for which the lower court cited it in the Contempt Order of October 1, 2008, in the Order Denying Progressive's Motion to Set Aside Contempt Orders, the Circuit Court transferred its reliance to W. Va. Code §31D-5-504(c). (App., Ex. 1, ¶¶ 5, 6). According to the Circuit Court, despite the plain language of Rule 45(b)(1) and of Rule 4(d)(1)(A), W. Va. Code §31D-5-504(c) authorizes service of a subpoena *duces tecum* upon the Secretary of State. (App., Ex. 1, ¶¶ 5, 6.)

W. Va. Code §31D-5-504(c) plays no role in the service of a subpoena *duces tecum* upon Progressive Classic. The statute provides, in part:

> In addition to the methods of service on a corporation provided in subsections (a) and (b) of this section, the Secretary of State is hereby constituted the attorney-in-fact for and on behalf of **each corporation created pursuant to the provisions of this chapter.** The Secretary of State has the authority to accept service of notice and process on behalf of each corporation and is an agent of the corporation upon whom service of notice and process may be made in this State for and upon each corporation. No act of a

> corporation appointing the Secretary of as attorney-in-fact is necessary. ... [Emphasis supplied].

First, unlike the implication contained in the Circuit Court's Order Denying Progressive's Motion to Set Aside Contempt Orders, W. Va. Code §31D-5-504(c) contains no reference whatsoever to the Secretary of State being authorized to accept service of a subpoena *duces tecum* upon Progressive Classic. Second, and perhaps more importantly, by its very terms, W. Va. Code §31D-5-504(c) is the statutory authority for appointing the Secretary of State as an attorney-in-fact only for corporations "created pursuant to the provisions of this chapter." Progressive Classic is not a West Virginia corporation and, obviously, was not created pursuant to the provisions of Chapter 31D. Thus, the lower court's shift in allegiance from W. Va. Code §33-4-12 to W. Va. Code §31D-5-504(c) is of no moment for W. Va. Code §31D-5-504(c) does not support the proposition that a subpoena *duces tecum* may be served upon Progressive Classic through the Secretary of State.

In denying Progressive Classic's Motion to Set Aside, the Circuit Court also inexplicably relied upon *White v. Berryman*, 187 W. Va. 323, 418 S.E.2d 917 (1992), stating that this Court's rationale in *Berryman* supported its finding that service of the subpoena *duces tecum* could be effectuated through the Secretary of State. (App., Ex. 1, pp. 4-5). *Berryman* provides no support for the lower court's conclusion.

In *Berryman*, the Secretary of State declined to accept service of a summons and complaint upon a state agency. *Id.* at 326, 418 S.E.2d at 920. Among the issues addressed by this Court on appeal was the proper method of obtaining service of a summons and complaint upon a state agency. Analyzing Rule 4, the Court concluded that because a state agency is a domestic public corporation, the Secretary of State was its attorney-in-fact and could be served with the summons and complaint under Rule 4(d)(6)(D). *Id.* at 329-30, 418 S.E.2d at 923-24.

The *Berryman* Court's holding has no application, however, to the issue of whether the mandatory language of Rule 45(b)(1) authorizing service of a subpoena *duces tecum* only as provided under Rule 4(d)(1)(A), somehow also authorizes service upon the Secretary of State. In short, *Berryman* provides no support for the lower court's holding.

The sole method by which a subpoena *duces tecum* may be served is set forth in Rule 45, not W. Va. Code §33-4-12 nor W. Va. Code §31D-5-504(c). Under Rule 45, a subpoena *duces tecum* "shall" be served in the manner set forth in Rule 4(d)(1)(A). Rule 4(d)(1)(A) does not authorize service of a subpoena through the Secretary of State.

D. The Circuit Court improperly imposed sanctions upon Progressive Classic by rewriting Rule 45.

Progressive Classic properly relied upon the plain and mandatory language of Rule 45(b)(1) to conclude that the subpoena *duces tecum* was not properly served and, therefore, was invalid. *See West Virginia Advocates, supra*, at 684, 364 S.E.2d at 10. In order to assert jurisdiction over Progressive Classic, the trial court rewrote the Rules of Civil Procedure and incorporated into Rule 45 language not found within the Rule itself.

The trial court's version of Rule 45(b)(1) now reads:

> A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made in the same manner provided for service of process under Rule 4(d)(1)(A) *or any of the other manners provided for service of process under Rule 4(d)* ....

If this Court wishes to rewrite Rule 45, then it has the authority and the prerogative to do so. The Circuit Court does not have that leeway.

Despite the clarity of Rule 45(b)(1), the Circuit Court circumvented the same and authorized service through a means not recognized by Rule 45(b)(1). This Court cannot permit lower courts to rewrite the Rules of Civil Procedure.

Progressive Classic had no warning that the lower court would insert into Rule 45(b)(1) language which is not found within the Rule itself. Relying on Rule 45(b)(1), as

written, Progressive Classic correctly believed that the subpoena *duces tecum* was not properly served and, therefore, was invalid. If this Court chooses to interpret Rule 45(b)(1) more broadly than currently written, then it may do so. Progressive Classic, however, should not be punished for its reliance upon the existing and unambiguous language of Rule 45(b)(1).

Thus, in the event this Court finds that in the future a subpoena *duces tecum* may be served upon a corporation in the manner set forth in Rule 4(d)(5) through 4(d)(7), the lower court still must be prohibited from enforcing the contempt sanctions against Progressive Classic. Under the law, as it existed at the time of the attempted service of the subpoena *duces tecum* upon Progressive Classic, service through the Secretary of State was not proper. Progressive Classic should not be penalized for relying upon that law and concluding the subpoena *duces tecum* was defective for lack of proper service.

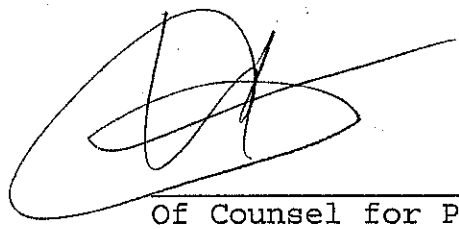
V. CONCLUSION

Plaintiff's attempt to serve the subpoena *duces tecum* upon Progressive Classic through the Secretary of State was invalid. Because it was not properly served, the subpoena *duces tecum* was unenforceable. As a result, the lower court had no jurisdiction over Progressive Classic and its Orders, based upon the premise that the subpoena *duces tecum* properly was served, must be set aside.

VI. PRAYER FOR RELIEF

The petitioner, Progressive Classic Insurance Company, respectfully prays that this Court grant its Petition for Writ of Prohibition, and issue a rule to show cause against respondent, The Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County. Further, your petitioner prays that this Court prohibit respondent from enforcing the Order Denying Progressive's Motion to Set Aside Contempt Orders, vacate that Order and direct the respondent to enter an Order Granting Progressive Classic Insurance Company's Motion to Set Aside Contempt Orders. Your petitioner also prays for such further relief as this Court may deem just.

Respectfully submitted,



Of Counsel for Petitioner Progressive Classic Insurance Company

R. Carter Elkins
W. Va. State Bar I.D. 1116
Laura L. Gray
W. Va. State Bar I.D. 5240

Campbell Woods, PLLC
517 Ninth Street, Suite 1000
Post Office Box 1835
Huntington, West Virginia 25719-1835
(304) 529-2391

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PROGRESSIVE CLASSIC INSURANCE COMPANY,

Petitioner,

v.

No.: _____
(Civil Action No.: 08-C-330-2
in the Circuit Court of Harrison County)

HONORABLE THOMAS A. BEDELL, JUDGE, Circuit Court of Harrison County,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, of counsel for petitioner, Progressive Classic Insurance Company, does hereby certify that the foregoing Petition for Writ of Prohibition on Behalf of Progressive Classic Insurance Company and Memorandum of Law in Support of Petition for Writ of Prohibition on Behalf of Progressive Classic Insurance Company were this day served upon the following by mailing a true copy of the same this date, postage prepaid, to:

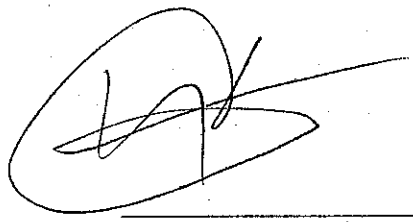
Honorable Thomas A. Bedell, Judge
Harrison County Circuit Court
Harrison County Courthouse
301 W. Main Street
Clarksburg, West Virginia 26301

Joseph Shaffer
Prosecuting Attorney of Harrison County
Harrison County Courthouse
301 W. Main Street
Clarksburg, West Virginia 26301

David J. Romano, Esquire
Romano Law Office
363 Washington Avenue
Clarksburg, West Virginia 26301

G. Thomas Smith, Esquire
Smith, McMunn & Glover, PLLC
516 W. Main Street
Clarksburg, West Virginia 26301

Done this 24th day of March, 2009.



Of Counsel for Petitioner Progressive
Classic Insurance Company

R. Carter Elkins
W. Va. State Bar I.D. 1116
Laura L. Gray
W. Va. State Bar I.D. 5240

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517 Ninth Street, Suite 1000
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